



## REPORT FROM SAN FRANCISCO - DISCHARGING TAXES

### In This Issue:

BULLETIN NOV. 28 2011

- ACADEMY LIVE COURSE SUCCESSFULL IN SAN FRANCISCO
- ENROLLEES COMMENT ABOUT THE COURSE
- MORGAN'S JOURNAL
- OUR DISTINGUISHED FACULTY
- MATERIALS AND RESOURCES INCLUDED IN THE COURSE
- SELECTED ISSUE: IS A POST-ASSESSMENT 1040 A VALID TAX RETURN?

### ACADEMY LIVE COURSE SUCCESSFULL IN SAN FRANCISCO

RIGHT: The class convenes in the Tiburon-Mendocino room at Holiday Inn at Fisherman' Wharf



#### TAX DISCHARGE COURSE CONVENES AT FISHERMANS' WHARF

On Monday, Nov. 14 thirty-five students and faculty from 14 states convened for the Bankruptcy Academy's tenth annual live course - Discharging Taxes in Consumer Bankruptcy cases.

Monday was devoted to the fundamental rules of tax discharge in chapter 7 and 13, including tolling events. **Max Cline** and **Melanie Tavare** spoke on the case [IN RE JONES](#), won in the 9th circuit by Melanie, on the tolling effect of chapter 13 on post-petition tax claims.

Tuesday covered tax liens, lien stripping, and using transcripts. In the afternoon guest faculty presented non-bankruptcy remedies for delinquent taxes, including offers-in-compromise taught by **David Greenberg**, then **Reba Wingfield** on collection due process procedures, followed by tax court litigation by **Mac MacPherson**.

Florida attorney **Larry Heinkel** presented the premier unavailing of his wonderful online tolling calculator, the [THE TAX DISCHARGE DETERMINATOR](#).

Enrollees again convened on Wednesday for the "Enrollees' Case Clinic" where attendees brought some of their actual, current delinquent tax cases to

the class and we all brain-stormed on how best to handle them using bankruptcy and non-bankruptcy legal remedies. Account transcripts were thrown up on the screen for class analysis.

Taught by experienced tax and bankruptcy professionals, this is an intensive, practical, and thorough course of instruction on handling consumer bankruptcy cases with delinquent tax liabilities

### **TOPICS COVERED:**

Discharging federal and state income taxes, interest and penalties in consumer bankruptcy cases.

- Personal income taxes
- Chapter 7 and 13 cases
- Tolling events
- Using Tax Transcripts
- Kinds of transcripts
- How to get them
- The IRS Priority Hotline
- Transaction codes, etc.
- Freedom of Information Act
- Penalties
- Interest
- Sales taxes
- Payroll trust fund taxes
- Handling tax liens
- Handling a tax discharge case
- Using checklists
- Other forms
- Getting help (enrolled agents etc.)
- Dealing with clients
- Dealing with the IRS

### **Non-Bankruptcy Remedies For Delinquent Taxes**

- Offer-in-Compromise
- Collection Due Process
- Transmutation agreements
- Litigation of tax issues

### **OUR DISTINGUISHED GRADUATES:**

[asterisk indicates faculty]

Andy Kern, Petaluma, CA  
Brian Sheehan, Everett, WA  
Cawood Bebout, Burlington, WA  
Chandra Apperson, Redwood Valley, CA  
David Floren, Pleasanton, CA  
\*David Greenberg, San Diego, CA  
Donald Bryeans, Hurst, TX

\*Don (Mac) MacPherson, Phoenix, AZ  
G. Martin Johnson, Burnsville, MN  
Gary Hinck, Topeka, KA  
George Holler IV, Milford, CT  
Gina Klump, Petaluma, CA  
Glen Gates, Fresno, CA  
Gregory Hilton, Chicago, IL  
Herbert "David" Cox, Lynchburg, VA  
Jeremy Winter, Sacramento, CA  
Keith McAllister, Tiburon, CA  
\*Larry Heinkel, Tampa Bay, FL  
Laura Ferree, Truckee, CA  
\*Max Cline, Oakland, CA  
\*Melanie Tavare, Oakland, CA  
Nate Haynor, Stillwater, MN  
Nathan MacPherson, Encinitas, CA  
Patrick Greenwell, Sonora, CA  
Paul Groff, Long Beach, CA  
\*Reba Wingfield, Little Rock, AR  
Robert Jacobs, Pleasanton, CA  
Robert LaMontagne, Statesville, NC  
Ross Edward Murray, London, KY  
Sherri Carver, Oklahoma City, OK  
Steven Hathaway, Bellingham, WA  
Thomas Neeleman, Ever

[CLICK HERE TO BROWSE THE PHOTO ALBUM FOR THE EVENT](#)

[CLICK HERE TO SEND YOUR NEWS TO THE BANKRUPTCY LETTER](#)

## ENROLLEES COMMENT ABOUT THE COURSE

RIGHT: Chief presenter Morgan King addresses a question from an enrollee

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## GRADUATES REPORT BACK ON THE COURSE

"I truly enjoyed your conference tremendously. Finally, a great topic discussed at a high level as it needs to be! Great speakers and attendees." - Larry Heinkel, St. Petersburg, FL

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"As always, the program was a great success. Personally, I became aware of several new procedures and perspectives that I can apply right away on behalf of my clients. This is invaluable to me." - David S. Greenberg, San Diego, CA

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"Thanks again for the great seminar. In over 30 years of CEB classes, I don't think I have ever been through such a dynamic and informative seminar. And I think the extensive written materials alone lift your program above the rest. You will see me again." - Keith McAllister, Tiburon, CA

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"I thought the overall program was great. The OIC presenter, Dave Greenbergh, was very helpful during and after the program. I thought Morgan King's presentation was clear and understandable - and I appreciated Morgan's willingness to address class questions as they came up. Larry Heinkel's presentation was excellent as was Reba Wingfield's presentation. Overall, a really good presentation. Everything was top notch." - Robert Jacobs, Pleasanton, CA

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"Really enjoyed the class and it opened my eyes to mistakes I have made in the past. It also showed me that I could handle tax matters. I have already recommended this class to other attorneys. Thank you for taking the time to put this class together and instruct it." - Robert LaMontagne, Statesville, NC

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"I liked Morgan's low key, informal approach. I would have preferred a little more structure on the basics as I need it but I understand there was a broad range of participants. The materials were very helpful. I will attend future events." - Glen Gates, Fresno, CA

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"Great seminar! There was a lot of information to digest, but everything was timely and relevant." - Gina Klump, Petaluma, CA

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[CLICK HERE TO VISIT KING BANKRUPTCY PRACTICE](#)

## MORGAN'S JOURNAL

RIGHT: Oakland, CA attorneys/faculty Max Cline and Melanie Tavare listen intently to a presentation. Faculty presenter David Green (offers-in-compromise)



is in the background (glasses, multi-colored shirt).

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Sunday night my son, Morgan Jr. and his associate Christina help me **get all the materials out on the tables**, to be ready for the morning. I try the wi-fi in the conference room with my nifty new projector and laptop, and they work! This is a good omen. The room is laid out class-room style, exactly as I requested. We have competent hotel staff! Another good omen.

Monday morning starts out with **continental breakfast** in the conference room, followed by stimulating and entertaining **presentations**. We break for lunch until 1:30 to give enrollees time to stroll down to the Wharf (only a block away) for fine seafood.

The first day is mostly me droning on about the **basics of discharging taxes**. Certain topics demand a lot of attention; we devote a considerable amount of time on the question, **what is a tax return for purposes of the 2-year rule?**

By the end of the day, as the material leaves clearly established rules and morphs into emerging or unsettled issues, the attendees begin to ask tough questions.

Predictably, **attendees start engaging in debates among themselves, sometimes straying off-topic**. I let them go for awhile, but eventually call the room back to order. I allow this loose format because there are always tax attorneys among the attendees who usually contribute important information during these side-dialogues, and typically some bankruptcy attorneys contribute new insights, as well.

Monday night I treated the faculty to **dinner at my favorite San Francisco restaurant, Scoma's**, which is hidden out on the pier (you have to go down this dark film-noirish alley to get there). The seafood is really fresh (the "fish receiving station" is about 25 feet from Scoma's front door!). I had my favorite - Halibut. The fishing boats rest gently in the water just outside the window (they are not merely touristy - they are actual working boats fishing local waters for Dungeness crab, Pacific salmon, halibut, sole, prawns, and spiny lobster. Hmmm!

The hotel provides free wi-fi (although a couple of attendees were unable to dial it up in their guest rooms ... some grumbling).



Tuesday I threw some **Account transcripts and Specific transcripts up on the screen**, and we dove into how to identify the key information on them, including some red herrings such as code 150 "Tax Return Filed" (which is never the date the return was filed - very misleading!).

My son, Morgan King III, and his associate Christina Gatterman, came in to photograph the event. Chrstina comes forward to announce the hotel wi-fi access code to the enrollees. For lunch the three of us tried a place I've never been to before - seemed too touristy - Castagnola's at the Wharf. To my surprise, the seafood was great!

By Wednesday morning I'm bordering on brain-dead, but fortunately, **for the clinic several attorneys brought actual cases with transcripts** for us to pick apart, which got the adrenalin pumping again. At the end of the session at noon, one attorney came to me and confessed that what he had learned made him realize he had committed malpractice on a case he had filed recently (he had not been aware of the tolling problem). We commiserated a bit.

Altogether, though, another **richly rewarding experience for all of us, and particularly me** (I always learn something from the experience of others), and I think the enrollees came away with a lot of important information.

[CLICK HERE TO VISIT SCOMAS](#)

## OUR DISTINGUISHED FACULTY

RIGHT: During a break. The table is covered with course materials

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### SEVEN DISTINGUISHED ATTORNEYS COMPRISED THE FACULTY

Some of the presenters were really local (Max Cline and Melanie Tavare, across the Bay in Oakland), but some flew long distances to contribute to the program. Larry Heinkel, for example, flew from Tampa Bay, Florida!

The Academy expresses its gratitude for the time, work and talent these individuals invested in the program.

MORGAN KING, Dublin, CA



REBA WINGFIELD, Little Rock, Ark.  
 MAX CLINE, Oakland, CA  
 MELANIE TAVARE, Oakland, CA  
 DAVID GREENBERG, San Diego, CA  
 LARRY HEINKEL, Tampa Bay, FL  
 MAC MacPHERSON, Phoenix, AZ



[CLICK HERE FOR MORE INFO ABOUT THE FACULTY](#)

## MATERIALS AND RESOURCES INCLUDED IN THE COURSE

RIGHT: During a break, enrollee studies the outline.

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150-page course outline  
 King's 600-page book Discharging Taxes - Release 2011  
 King's 400-page book Offers-In-Compromise Release 2009  
 Case handling checklists & FlowCharts  
 Forms and sample documents  
 Tables of key codes (520, 971, etc.)  
 Chief Counsel memoranda etc.  
 Password to King's online video course Discharging Taxes  
 Free demo of Heinkel's online Tax Discharge Determinator  
 1 Year free subscription King's TaxGram  
 Other key documents and resources



[CLICK HERE TO SEE ALL ACADEMY COURSES](#)

## SELECTED ISSUE: IS A POST-ASSESSMENT 1040 A VALID TAX RETURN?

RIGHT: Faculty presenter Mac MacPherson grabs a bite during a break.

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**The class spent a considerable amount of time on the question, what is a valid tax return for purposes of the two-year rule? 11 U.S.C. 523(a)(1)(B)**

Specifically, in a case where the IRS filed a substitute-for-return ("SFR" - sometimes called a service-filed return), and then has proceeded to assess the tax, and only then has the taxpayer filed his/her 1040 return, is that return a valid return for purposes of the



2-year rule?

## HELD VALID RETURNS

The jurisdictions are not in agreement on this issue. While several courts have held that such a return is not a valid return, including the 4th and 6th circuits, others have rejected a *per se* rule that a post-SFR post-assessment return is never a valid return.

Instead, those opinions are characterized by the rule that the question should be decided on a case-by-case basis. Those opinions cite the Beard case and hold that the key question is whether the return indicates an honest attempt to comply with the tax regulations. In *In re Nunez* (link to full opinion below) the court said:

" . . . the preparation of substitute returns and assessment by the IRS does not act as a complete bar to efforts by the Debtor to file a return. That is, the Debtor can still take actions which will satisfy Section 523(a)(1)(B).

"We also agree with the reasoning of the bankruptcy court, and the other courts that have so held, that Congress could have conditioned discharge of tax debt on whether a return was filed prior to an assessment. As correctly noted by the court, Congress used assessment as a trigger for other time periods in the Code, for example, the priority qualifications found in Section 507(a)(8)(A)(ii).

"When Congress includes particular language in one section of the Code, but omits it in another, it is presumed to have acted intentionally and purposely. [cite] We will not read into Section 523(a)(1)(B) the requirement that a debtor must have filed a return prior to an assessment by the IRS."

[In re Nunez, 232 B.R. 778 \(B.A.P. 9th Cir., 1999\)](#)

The most recent case holding a post-SFR post-assessment return to be a valid return appears to be the 8th Circuit ruling in *In re Colsen*. Here the court observed:

"The government's essential position is that because Mr. Colsen's 1040 forms were filed after the IRS's assessment, they do not evince an honest, genuine attempt to satisfy the law and thus he has not satisfied the requirement that returns be filed in order for tax liabilities to be dischargeable. But we have no

evidence to suggest that the forms appeared obviously inaccurate or fabricated; indeed, Mr. Colsen's 1040 forms contained data that allowed the IRS to calculate his tax obligation more accurately: The information contained in the forms was honest and genuine enough to result in thousands of dollars of abatements of tax and interest.

"This contrasts, incidentally, with the situation in *Hindenlang*, 164 F.3d at 1031, where the taxpayer's forms contained essentially the same information as the substitute forms that the IRS prepared and the calculation of tax did not change substantially.

"The IRS apparently has found post-assessment returns useful, as it has required taxpayers to file them before the agency would consider proposed offers to compromise tax liabilities. See *Payne*, 431 F.3d at 1060. Filing the forms served an important purpose under the tax laws for Mr. Colsen. That the IRS did not also collect more tax as a result of Mr. Colsen's filings does not undermine their role in determining Mr. Colsen's ultimate liabilities.

"The theory of the case that the government espouses holds only if we consider the accurate calculation of a taxpayer's obligations not to be a valid purpose that satisfies the tax laws, which we decline to do."

[In Re: Gary Wayne Colsen, 446 F.3d 836 \(8th Cir. 2006\)](#)

#### **Cases holding returns were valid:**

In re *Payne*, 331 B.R. 358 (Bankr. N.D. Ill., 2005)  
In Re: Gary Wayne Colsen, 446 F.3d 836 (8th Cir. 2006)  
In re *Nunez*, 232 B.R. 778 (B.A.P. 9th Cir., 1999)  
In re *Crawley*, 244 B.R. 121, 127-28 (Bankr.N.D.Ill.2000)  
In re *Woods*, 285 B.R. 284 (Bankr. S.D. Ind., 2002)

#### **NOT VALID RETURNS**

The contrary has been held in a number of cases. In *In re Henne* the court observed:

"In this case, the post-assessment Forms 1040 were treated as a request for reconsideration and, had the Debtor responded to IRS's request for verification of items reported on his belated Forms 1040, the submissions may have affected his tax liability.

"However, the Debtor did not follow up with the IRS after filing his submissions in 1998, and he failed to respond to the IRS's requests for supporting documentation. The Debtor testified that the IRS examiner was "very helpful" when he met with her in 1997, but he made no effort to contact her or anyone at IRS concerning his post-assessment submissions.

"His lack of action supports the finding that he did not expect his post-assessment forms to affect his tax liability — i.e., "to satisfy the requirements of the tax law." And, in fact, the late submissions had no tax consequences."

[In re Henne, 359 B.R. 776 \(Bankr.Ariz., 2007\)](#)

But note that the Henne ruling does not actually contradict the rulings in the above cases, which basically rejected a *per se* rule and held that each case should be looked at on a case-by-case basis. In looking at the facts in Henne the court merely found that the debtor's conduct as a whole evidenced a lack of a good-faith effort to comply with the tax laws.

**Cases holding returns were invalid:**

U.S. v. Klein, 312 B.R. 443 (S.D. Fla., 2004)  
In re Henne, 359 B.R. 776 (Bankr.Ariz., 2007)  
In re Hindenlang, 164 F.3d 1029, 1033 (6th Cir.)  
United States v. Ralph, 266 B.R. 217, 219 (M.D.Fla.2001)  
In re Ehrig, 308 B.R. 542 (Bankr. N.D.Okla., 2004)  
In re Moroney, 352 F.3d 902 (4th Cir., 2003)  
In re Miniuk, 297 B.R. 532 (Bankr. N.D. Ill., 2003)

**SUMMARY OF THEORIES**

Looking at the cases, the theories appear to boil down to the following:

**1. Serve no valid purpose.** Where the return merely mimics the assessment, the return serves no valid purpose. However, some cases hold that such returns are nevertheless valid if they appear valid on their face and satisfy the 4-prong test of the Beard case.

**2. The return corrects an erroneous IRS assessment:** it serves a purpose and is more likely to be deemed a valid return. However, some cases hold that even those returns are invalid.

**3. The 4-part Beard test.** Almost all of the cases apply the 4-parts of a valid return as prescribed by the

Beard case. These are: 1) Purports to be a return, 2) Contains the math necessary to do an assessment, 3) is signed under penalty of perjury, 4) represents a good-faith effort to comply with the filing requirements.

There is little official discussion of the Beard test in publicly available IRS literature. One memo contains the following:

"In general, a document filed with the Service is treated as a return if the document: (1) contains sufficient data to calculate the tax liability; (2) purports to be a return; (3) represents an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) is executed under penalties of perjury. Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986) (citing Badaracco v. Commissioner, 464 U.S. 386 (1984); Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934); and Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930))." [Internal Revenue Bulletin: 2005-37](#)

### **PARTIALLY VALID RETURN?**

An interesting twist to this issue that does not appear to be addressed in any published opinion, is *whether a post-SFR post-assessment 1040 could be partially valid, and partially invalid.*

In an internal memorandum dated Sept. 28 2011 the IRS provided guidance in cases of post-SFR, post-assessed 1040s, and stated the IRS position that a tax already assessed could not be the basis for a valid return subsequently filed, but also made this interesting observation:

"When the debtor submits a Form 1040 after the assessment under IRC § 6020(b), only the portion of the tax that was not previously assessed would be subject to discharge."

In other words, if the taxpayer's 1040 shows more tax owed than was assessed, the additional tax would be deemed assessed because of that 1040, thus rendering that portion of the return a valid return for purposes of the 2-year rule.

While this scenario may be rare, it is worth including on a checklist somewhere.

[IRS Memorandum SBSE-05-0911-078 Sept. 28 2011](#)

**THE KING BANKRUPTCY LETTER** is published by KING BANKRUPTCY PRACTICE FOR BANKRUPTCY PROFESSIONALS and KingZpress. P.O. Box 2952 Dublin California 94568 (925) 829-6460. Morgan D. King, Editor. © King Financial Media 2005, 2006, 2007, 2008, 2009, 2010, 2011. CONTACT US AT [morgan@morganking.com](mailto:morgan@morganking.com). [CLICK HERE TO VISIT KING BANKRUPTCY ACADEMY](#). Go to [BankruptcyLetter.com](#) for more info.  
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